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Original Articles

Understanding the Wire Act: Why the Department of Justice Missed the Mark When It Overturned Fifty Years of Interpretation of the Act

Darryl Nirenberg, David Fialkov, and Ryan McClafferty

I. INTRODUCTION

In December 2011, the Office of Legal Counsel (OLC)[1] of the Department of Justice (DOJ or Department) issued an opinion (Opinion or OLC Opinion)[2] reversing the Department's long-held position on § 1084(a) of the Wire Act[3] and its application to gambling that does not relate to a "sporting event or contest."[4] Prior to the Opinion's issuance, the Department had interpreted § 1084(a) to cover all forms of gambling.[5] As a practical matter, this operated as a barrier to widespread gambling, including lottery and casino games, over the Internet in the United States.[6]

The OLC Opinion effectively changed the law as it had been enforced for five decades, ushering in perhaps the most significant change in gambling policy in our nation in generations—taking legalized gambling from a tightly controlled activity requiring travel to a destination, and transforming it into an activity potentially available 24/7 on cell phones, mobile devices, and home computers. The Opinion does not carry the force of law.[7] Despite this fact, the Opinion has already had an impact on gambling activity. Three states have seized upon the Opinion in authorizing non-sports gambling over the Internet, and three other states have begun offering online lotteries and casino games through their state lotteries.[8] Other states are considering authorizing Internet gambling, either through commercial or tribal casinos or through their state lotteries. Reportedly, as a result of the Opinion, the DOJ and the Federal Bureau of Investigation (FBI) have "ceased cracking down on online gambling."[9]

Darryl Nirenberg is a partner at Steptoe and Johnson LLP in Washington, DC. David Fialkov is vice president of Government Relations and legislative and regulatory counsel of the National Association of Truck Stop Operators (NATSO) in Washington, DC. Ryan McClafferty is an employee of Steptoe and Johnson LLP in Washington DC.

[1]The Department of Justice's (DOJ's) Office of Legal Counsel (OLC) provides authoritative or controlling legal advice to the president and all executive branch agencies. OLC opinions do not have the force of law, but they are generally considered binding on the executive branch. *See* Joseph Marchesano, *Where Lawfare Meets Lawsuit in the Case of* Padilla v. Yoo, 34 Seattle U. L. Rev. 1575, 1583 (2011).

[2]Whether Proposals by Illinois and New York to Use the Internet and Out-of-State Transaction Processors to Sell Lottery Tickets to In-State Adults Violate the Wire Act, 35 Op. O.L.C. 2, 2011 WL 6848433 (2011) [hereinafter OLC Opinion].

[3]18 U.S.C. § 1084(a).

[4]*See* OLC Opinion, *supra* note 2, at 1.

[5]*The Internet Gambling Prohibition Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 109th Cong. 10 (2006) (statement of Bruce G. Ohr, Chief of Organized Crime and Racketeering Section, Criminal Div., U.S. Dep't of Justice) [hereinafter DOJ Hearing].

[6]*See* I. Nelson Rose and Rebecca Bolin, *Game On for Internet Gambling: With Federal Approval, States Line Up to Place Their Bets*, 45 Conn. L. Rev. 653, 674 (2012); *see also* Charles Doyle, Cong. Research Serv., 97-619, Internet Gambling: An Overview of Federal Criminal Law 24 (2012).

[7]*See* Loretta Lynch, U.S. Att'y Gen., written responses to Questions for the Record during her confirmation process (Feb. 9, 2015), <http://www.judiciary.senate.gov/imo/media/doc/Lynch%20QFR%202-9-15.pdf> ("I am not aware of any statute or regulation that gives OLC opinions the force of law.").

[8]New Jersey, Delaware, and Nevada have authorized non-sports gambling over the Internet. Michigan, Minnesota, Illinois, and Georgia have authorized online lotteries, with Minnesota subsequently reversing its action.

[9]Leah McGratch Goodman, *How Washington Opened the Floodgates to Online Poker, Dealing Parents a Bad Hand*, Newsweek, Aug. 14, 2014, <http://www.newsweek.com/2014/08/22/how-washington-opened-floodgates-online-poker-dealing-parents-bad-hand-264459.html>.

As this article will demonstrate, the Opinion's narrow interpretation of the Act as inapplicable to non-sports-related online gambling is incorrect. The Opinion ignores important aspects of the Act's purpose and legislative history, as well as established canons of statutory interpretation. In one instance, for example, the Opinion cites as authority congressional testimony in 1961 by a Department official, but neglects to disclose that the testimony was in relation to legislative language that never became law. The OLC's flawed approach is particularly problematic because it constitutes a significant substantive change in how the law has been enforced for decades, with serious implications for our country's gambling policy and for state sovereignty.

Notably, despite the broad reach of the Opinion and the fact that Congress relied on DOJ's longstanding interpretation of the Act when it enacted gambling legislation in 2006, the Opinion's author apparently did not consult with Congress. There is no record of the OLC making its deliberations on this issue even known to Congress, despite key senators specifically requesting that the attorney general consult with them "before finalizing a new position that would open the floodgates to Internet gambling,"[10] and despite the House Energy and Commerce Committee holding a hearing on Internet gambling just weeks before the Opinion's release.[11]

Further, there is no indication that the Opinion's author considered the very significant concerns raised by law enforcement agencies with respect to online casinos, nor consulted with such agencies. There was no opportunity for public comment, or even any public awareness that a policy change with the potential to make gambling pervasive in American society was under consideration. There is no evidence the author assessed significant social issues, such as the predatory nature of online gambling, its potential for exploiting children, and the impact on individuals with a gambling addiction.

The OLC Opinion has caused a great deal of uncertainty for a number of affected parties—uncertainties and legal questions that will persist until the Wire Act is clarified by Congress, the courts, or through another review by the Department.[12] Furthermore, although this article focuses on the OLC Opinion and its reinterpretation of the Wire Act, certain Internet gambling activities may be proscribed by other statutes not addressed in the Opinion.[13]

II. ANALYSIS

Section 1084(a) of the Wire Act states:

> Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined under this title or imprisoned not more than two years, or both.[14]

This provision contains two broad clauses. The first clause bars anyone engaged in the business of betting or wagering from knowingly using a wire communication facility "for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest."[15] The second clause bars anyone engaged in the business of betting or wagering from knowingly using a wire communication facility to transmit communications that either (a) entitle the recipient to "receive money or credit as a result of bets or wagers" or (b) provide "information assisting in the placing of bets or wagers."[16]

Whether the Wire Act applies to gambling for non-sports-related wagers hinges on the following question: Does the phrase "on any sporting event or

[10]Letter from Harry Reid, U.S. Sen. (D-Nev.), and Jon Kyl, U.S. Sen. (R-Ariz.), to Eric Holder, U.S. Att'y Gen. (July 14, 2011), <https://chaffetz.house.gov/sites/chaffetz.house.gov/files/documents/8%20-%20Reid-Kyl%20Letter.pdf>.

[11]*Internet Gaming: Regulating in an Online World: Hearing Before the Subcomm. on Commerce, Manufacturing, and Trade of the H. Comm. on Energy and Commerce*, 112th Cong. (2011).

[12]For example, the Opinion does not necessarily shield payment processors from processing "bets or wagers" that are prohibited under the Unlawful Internet Gambling Enforcement Act; only Congress and the courts can determine what conduct is prohibited under that law.

[13]Indeed, the Interstate Transportation of Wagering Paraphernalia Act of 1961, 18 U.S.C. § 1953(a), bars Internet lotteries. *See* United States v. Norberto, 373 F. Supp. 2d 150 (E.D.N.Y. 2005).

[14]18 U.S.C. § 1084(a) (2012).

[15]*Id.*

[16]*Id.*

contest" modify both the first and second clause in § 1084(a), or does the phrase modify only the first clause in § 1084(a)? For fifty years after President John F. Kennedy signed the law in September 1961, the Department interpreted the term as modifying only the first clause. The OLC Opinion proposes, however, that the term modifies both clauses, leading to the conclusion that the Wire Act covers only gambling on sporting events and contests.[17]

This conclusion is incorrect, and the manner in which it was reached was flawed. When analyzed both on its face and in the context of the history of the Wire Act's development, enactment, and enforcement, it is clear the first clause of § 1084(a) applies to sports-related wagers, and the second clause of § 1084(a) applies to all wagers.

A. Traditional canons of statutory construction dictate that only the first clause of § 1084(a) is limited to sports betting, while the second clause covers all forms of gambling

To properly read § 1084(a), it is helpful to divide the clauses into different subsections, as follows:

> Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for[:]
>
> [a] the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest[;]
>
> or
>
> [b] the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers,
>
> shall be fined under this title or imprisoned not more than two years, or both.

Reading the Act in this manner illuminates how § 1084(a)'s first clause applies to bets or wagers "on any sporting event or contest," and the second clause applies to *all* "bets or wagers," with no qualification.[18] This reading is supported by well-established canons of statutory construction, including the rule against surplusage and *expressio unius est exclusio alterius*.

1. Reenactment doctrine

Under the reenactment doctrine, when Congress "reenacts" a law without significant change, it implicitly accepts well-settled judicial or administrative interpretations of the law.

> In addition to the importance of legislative history, a court may accord great weight to the longstanding interpretation placed on a statute by an agency charged with its administration. This is especially so where Congress has reenacted the statute without pertinent change. In these circumstances, congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.[19]

This doctrine undercuts the OLC's Opinion on the Wire Act in light of Congress's passage of the Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA).[20] The UIGEA does not criminalize gambling activities; rather, it incorporates existing laws defining illegal gambling activities—including the Wire Act—and prohibits acceptance of payment for those activities.

Congress and DOJ understood the Wire Act to apply to non-sports gambling when the UIGEA passed. Indeed, leading up to enactment of the UIGEA, the Department had written and testified before Congress on multiple occasions that the Wire Act applied to both non-sports and sports betting.[21] The UIGEA Conference Report makes clear that Congress understood non-sports gambling over the wires to be illegal:

> The safe harbor would leave intact the current interstate gambling prohibitions such as the Wire Act, federal prohibitions on lotteries, and the Gambling Ship Act so that casino and lottery games could not be placed on websites and individuals could not access these games from their homes or businesses.[22]

The reenactment doctrine supports interpreting the Wire Act as Congress and DOJ did when the UIGEA was constructed—to cover gambling beyond sports betting.

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[17] OLC Opinion, *supra* note 2, at 4–5.
[18] 18 U.S.C. § 1084(a).
[19] N.L.R.B. v. Bell Aerospace Co. Div. of Textron, Inc., 416 U.S. 267, 274–75 (1974).
[20] 31 U.S.C. §§ 5361–67 (2012).
[21] *See infra* note 38.
[22] *Conference Report on H.R. 4954, Safe Port Act*, 152 Cong. Rec. H8026, H8029 (Sept. 27, 2006) (statement of Rep. Leach).

2. The rule against surplusage

A basic principle of statutory interpretation is that effect should be given, if possible, "to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed."[23] The modern variant is that statutes should be construed "so as to avoid rendering superfluous" any statutory language.[24] The rule against surplusage is based on the principle that each word or phrase in a statute is meaningful and useful, and thus, an interpretation that would render a word or phrase redundant or meaningless should be rejected.[25]

Reading § 1084(a) as only applying to sports-related wagers (i.e., reading the term "on any sporting event or contest" as modifying both the first and second clause in § 1084(a)) would violate the rule against surplusage. Specifically, both the first and second clauses of the subsection contain language proscribing transmissions of "information assisting in the placing of bets or wagers." Interpreting this phrase as applying to gambling on sporting events or contests in both clauses would render the phrase redundant in the second clause and thus violate the rule against surplusage. Indeed, if the second clause was intended to be limited to sporting events or contests, there would be no need to insert the phrase "or for information assisting in the placing of bets or wagers" in that clause, since that phrase would proscribe conduct that is already plainly prohibited under the first clause.

By contrast, interpreting only the first clause in § 1084(a) as being limited to sports-related wagers prevents the "or for information assisting in the placing of bets or wagers" from becoming mere surplusage in the second clause and makes clear that the prohibition relating to "information" extends beyond sports betting to all forms of gambling.

If confronting two plausible interpretations, courts should construe a statute in a manner that gives effect to all its provisions,[26] so that no part is inoperative or superfluous,[27] void or insignificant.[28] This rule against surplusage precludes interpreting the second clause of § 1084(a) as being limited to sports-related wagers and supports the initial, long-standing interpretation of the Department that the Act covers all forms of gambling.[29]

3. Expressio unius est exclusio alterius

Expressio unius est exclusio alterius instructs that, where a statute designates a type of conduct or the things or persons to which it applies, courts should infer that all omissions were intentional exclusions.[30] "The intent of the legislature is expressed by omission as well as by inclusion."[31] The *expressio unius* canon derives from the general common-sense principle that when people say one thing they do not mean something else.[32]

The plain language of the Wire Act prohibits "the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers."[33] There is no qualifier limiting the forms of gambling to which this applies. As a textual matter, the Wire Act applies to such information related to all "bets or wagers."

When Congress uses a term or phrase in one part of a statute but excludes it from another, intent to include the missing term or phrase where it is excluded should not be implied.[34] Instead, omission

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[23]Inhabitants of the Township of Montclair v. Ramsdell, 107 U.S. 147, 152 (1883).

[24]Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104, 112 (1991).

[25]*See generally* William N. Eskridge et al., Cases and Materials on Legislation: Statutes and the Creation of Public Policy (3d ed. 2001).

[26]*See, e.g.*, Aden v. Holder, 589 F.3d 1040, 1044–45 (9th Cir. 2009).

[27]*See, e.g.*, Corley v. U.S., 556 U.S. 303, 314–15 (2009).

[28]*Id.*

[29]At first glance, this interpretation arguably makes the phrase "or for information assisting in the placing of bets or wagers" in the first clause redundant, because if such conduct is prohibited for *all* bets or wagers under clause two, it is redundant to prohibit it specifically for sports bets or wagers in clause one. This can be explained, however, by viewing the first clause as outlining the universe of prohibited conduct relating to *sports bets,* and the second clause as outlining the universe of prohibited conduct relating to *all bets.* By contrast, there is no valid explanation for this phrase being repeated in the second clause if that clause is *also* limited to sports-related wagers. It should also be noted that because this phrase appears in § 1084(a) twice, no plausible reading could render the phrase completely non-redundant.

[30]Ritchie v. Eberhart, 11 F.3d 587, 596 (6th Cir. 1993) (Merrit, J., dissenting); Carver v. Lehman, 558 F.3d 869, 876 n.13 (9th Cir. 2009).

[31]Ledwith v. Bankers Life Ins. Co., 54 N.W.2d 409, 419 (Neb. 1952).

[32]Ford v. United States, 273 U.S. 593, 611 (1927).

[33]18 U.S.C. § 1084(a).

[34]*See, e.g.*, Russello v. United States, 464 U.S. 16 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (citation omitted); *see also* Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 452 (2002).

of the same provision is significant to show different legislative intent for the two parts.[35] A reading of § 1084(a) as limiting both the first and second clauses to sports-related transmissions, however, as the OLC Opinion proposes, would require an interpretation that the phrase "on any sporting event or contest" modifies the second clause simply because it was included in the first clause.

The OLC Opinion attempts to argue that Congress unintentionally left out of the second clause the jurisdictional language "in interstate and foreign commerce," and consequently, it is reasonable to infer that the omission of "on any sporting event or contest" was also "unintentional."[36] However, by equating the absence of "in interstate and foreign commerce" with "on any sporting event or contest," the OLC Opinion ignores the well-established rule of construction that insertion of omitted words into a statute "is utterly unwarranted unless the omission from, or corruption of, the text is plain."[37] It is reasonable to infer that Congress assumed inclusion of jurisdictional language. Failure to include such language would constitute a plain corruption or omission because, without it, the Act would invite questions of constitutionality.

The absence in the second clause of "on any sporting event or contest"—which addresses the breadth of the provision, as opposed to jurisdiction—does not rise to the level of a "plain" corruption or omission. Thus, the OLC Opinion's insertion of "on any sporting event or contest" into the second clause was unwarranted.

It is also especially improper in interpreting a statute to insert words into that statute where the addition could partially defeat or undermine the statute's purpose.[38] The "on any sporting event or contest" language is not only non-essential, it would actually inhibit the Wire Act's efficacy as a tool for fighting organized crime by creating a loophole for certain types of gambling enterprises and activities—in effect proscribing use of the wires by organized crime for some forms of wagering, but not other forms commonly engaged in at the time.

Reading § 1084(a) as applying only to sports-related wagers (i.e., reading the term "on any sporting event or contest" as modifying both the first and second clause of § 1084(a)) would patently violate this canon of statutory interpretation because it contradicts Congress's broad goal of eliminating organized crime's gambling enterprises with the Wire Act and other laws.[39] There is no evidence that Congress, being fully aware that the wires were used to facilitate sports and non-sports bets alike, intended to differentiate between particular gambling activities, nor was there a logical reason for Congress to so differentiate.

4. The statutory scheme

Finally, it is a well-established principle of statutory construction that a law should be read as a harmonious whole, and its separate provisions interpreted within the context of the entire statutory scheme.[40] Interpreting § 1084(a) to proscribe activities beyond sports betting is more consistent with the Wire Act's overall structure and purpose than is the OLC's interpretation.

For instance, the language of § 1084(d) (the Wire Act's civil enforcement provision) supports application of the statute to gambling in general, not just sports betting. [41] Subsection (d), which allows law enforcement agencies to compel common carriers to stop carrying interstate gambling communications, refers to "gambling information."[42] It strains credulity that Congress would subject all transmissions of "gambling information" to such a restraint under the plain language of § 1084(d), but somehow exempt non-sports-related transmissions from prosecution under § 1084(a). Thus, given the OLC's concession

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[35]*See, e.g.*, Cox v. City of Dallas, 256 F.3d 281, 294 n.22 (5th Cir. 2001) ("Where one section of a statute contains a particular provision, omission of the same provision from a similar section is significant to show different legislative intent for the two sections") (citation omitted); *see also* Zhu v. I.N.S., 300 F. Supp. 2d 77, 81 (D.D.C. 2004) ("The statute uses different language, to be sure, and different language often connotes a different congressional intention or purpose.").

[36]OLC Opinion, *supra* note 2, at 6, 10.

[37]Harris v. Comm'r of Internal Revenue, 178 F.2d 861 (2d Cir. 1949), *rev'd on other grounds*, 340 U.S. 106 (1950).

[38]Mauzy v. Legislative Redistricting Bd., 471 S.W.2d 570, 573 (Tex. 1971) ("The law permits the interpolation of words into a constitutional or statutory provision when necessary to achieve clear intent, but interpolation should not be resorted to when to permit it will defeat overriding intent.") (citation omitted); *In re* Davies, 151 N.E. 205, 206 (N.Y. 1926) (holding that courts should not read words into statutes when doing so would defeat the intent of the statute).

[39]*See* H.R. REP. NO. 87-967 (1961) (stating that the purpose of 18 U.S.C. § 1084 is "to aid in the suppression of organized gambling activities").

[40]*See* United States v. Cooper, 396 F.3d 308, 313 (3d Cir. 2005); United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988); Kokoszka v. Belford, 417 U.S. 642, 650 (1974).

[41]*See* 18 U.S.C. § 1084(d).

[42]*Id.*

that the text of § 1084(a) "can be read either way,"[43] it makes much more sense to harmonize § 1084(a) with § 1084(d).

Furthermore, interpreting the second clause of § 1084(a) to apply to all forms of gambling is consistent with the statute's broad purpose. Given that Congress's overriding goal with the Wire Act and related laws was to prevent organized crime from sustaining itself with gambling revenue, it makes little sense that Congress would leave open a loophole for non-sports related gambling such as numbers rackets, especially when those involved in drafting the legislation were well aware of the use of the wires for this gambling activity.

B. The history and purpose of § 1084(a) also show that only the first clause of § 1084(a) is limited to sports betting, while the second clause covers all forms of gambling

The Wire Act's purpose was to target all forms of gambling activity utilized by organized crime entities. Examination of the Act's historical context and explicit language in the House Judiciary Committee Report reveals why the Department of Justice interpreted the Wire Act this way from the date of its enactment.

The House Judiciary Committee Report on the Wire Act states:

> The purpose of the bill is to assist the various States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses and to aid in the suppression of organized gambling activities by prohibiting the use of wire communication facilities which are or will be used for the transmission of bets or wagers and gambling information in interstate and foreign commerce.[44]

Similarly, the Report's section-by-section analysis explains that certain sports wagering is prohibited and then states without qualification that the Act "*also* prohibits the transmission of a wire communication which entitles the recipient to receive money or credit as a result of a bet or wager or for information assisting in the placing of bets or wagers."[45]

Congress included "gambling" and "like offenses" in its description of the activities the Act was designed to address—terms that extend well beyond sports betting.[46] Further, the Committee Report's reference to "organized gambling activities" supports the broad reading of the Act adopted by the Department from date of enactment until issuance of the OLC Opinion in 2011.

As documented in Senate hearings in the 1950s, organized gambling activities came in many forms, including those unrelated to sporting events. Prior to passage of the Wire Act, various congressional committees—specifically, the Senate Special Committee to Investigate Crime in Interstate Commerce in the early 1950s (known as the Kefauver Committee) and the United States Senate Select Committee on Improper Activities in Labor and Management in the late 1950s (known as the McClellan Committee)[47]—conducted exhaustive hearings on the tactics and illicit activities of organized crime in the United States.[48] While the McClellan Committee was primarily focused on mob infiltration into labor unions, both committees spent substantial amounts of time investigating gambling (e.g., "numbers" games, sports wagering) and the role it played in providing essential revenues to organized crime entities.[49] The Wire Act was designed to combat the evils these committees uncovered.[50]

1. The Department of Justice Interpreted the Wire Act to Cover Non-Sports Wagers for 50 Years

It was widely understood at the time of the Wire Act's enactment that its scope was not limited to

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[43]OLC Opinion, *supra* note 2, at 4.
[44]H.R. Rep. No. 87-967 (1961).
[45]*Id.*
[46]*Id.*
[47]The Senate Special Committee to Investigate Crime in Interstate Commerce was led by Senator Estes Kefauver and was known as the Kefauver Committee. The United States Senate Select Committee on Improper Activities in Labor and Management was led by Senator John McClellan and was known as the McClellan Committee.
[48]*See* Kaitlyn Dunphy, *Following Suit with the Second Circuit: Defining Gambling in the Illegal Gambling Business Act*, 79 Brook. L. Rev. 1295 (2013–2014).
[49]S. Special Comm. to Investigate Organized Crime in Interstate Commerce, 82nd Cong., Third Interim Rep., (Comm. Print 1951) [hereinafter Kefauver Report] ("[T]he $2 horse bettor and the 5-cent numbers player … provide the moneys which enable underworld characters to undermine our institutions.").
[50]*See* Department of Justice, Attorney General's Conference on Organized Crime (Feb. 15, 1950), at 78, for an early instance of a recommendation for federal legislation prohibiting the use of telephone, telegraph, or radio facilities for illegal gambling purposes. While discussion of telecommunications in the report focused on their use for illegal betting on horseracing, the Conference, and its report were focused on means to combat organized crime, a fundamental stated purpose of the Wire Act.

sports gambling. Congressional Quarterly's 1961 *Congressional Almanac*, for example, contemporaneously characterized the Wire Act as outlawing "use, supplying and maintenance of wire communications to aid betting … on races and other sports *as well as numbers games* . … "[51] In a letter to the Senate dated April 6, 1961, Attorney General Robert F. Kennedy affirmed the Act's intended broad application, writing that "[t]he purpose of this legislation is to assist the various states, territories, and possessions of the United States and the District of Columbia in the enforcement of their laws pertaining to gambling, bookmaking, and like offenses and to aid in the suppression of organized gambling activities … ."[52]

The Department—until late 2011—interpreted the Wire Act in precisely this manner, and in the years between the emergence of Internet gambling in the 1990s and the release of the 2011 OLC Opinion, the Department declared unequivocally on multiple occasions that the Wire Act prohibits *all* forms of online gambling, and that it had long held this view.[53]

For example, in 2005, Assistant Attorney General Michael Chertoff said, "As set forth in prior Congressional testimony, the Department of Justice believes that federal law prohibits gambling over the Internet, including casino-style gambling. While several federal statutes are applicable to Internet gambling, the main statutes are [the Wire Act and others]."[54] Then, in 2007, U.S. Attorney Catherine Hanaway, testifying on behalf of DOJ, stated, "The Department of Justice's view is and has been for some time that all forms of Internet gambling, including sports wagering, casino games and card games, are illegal under Federal law. While many of the Federal statutes do not use the term 'Internet gambling,' we believe that the statutory language is sufficient to cover it."[55]

The Department's reversal of its long-standing interpretation may result in less judicial deference being given to the 2011 OLC opinion. Since the Opinion does not carry the force of law, it is reviewed under the deference standard articulated in *Skidmore v. Swift & Co*.[56] Under *Skidmore*, a reviewing court would consider a number of factors to determine whether the Opinion is entitled to deference, including "the thoroughness evident in its consideration, the validity of its reasoning, [and] *its consistency with earlier and later pronouncements*."[57] Accordingly, because the Opinion falls short in each of these areas—most obviously, with respect to consistency—a court could very well determine that the OLC Opinion is entitled to little or no weight in deciding the breadth of § 1084(a) of the Wire Act.

2. In addition to bookmaking, the Kefauver Committee identified numbers games and lotteries as major sources of revenue for organized crime

In late 1949, numerous articles in newspapers and magazines warned that a national crime syndicate was gaining control of American cities by corrupting local government officials. Cities requested federal assistance to combat organized crime, only

[51]C.Q. Almanac 1961, at 383, <http://library.cqpress.com/cqalmanac/document.php?id=cqal61-1373549>.

[52]Letter from Robert Kennedy, Att'y Gen., to the United States Senate (Apr. 6, 1961), *reprinted in* S. Rep. No. 87-588, 87th Cong., 1st Sess., 4–5 (1961).

[53]For example, in 2003, John G. Malcolm, deputy assistant attorney general, testified before Congress that "The Department of Justice has long held, and continues to hold, the position that 18 U.S.C. § 1084 applies to *all types of gambling, including casino-style gambling, not just sports betting.'' Unlawful Internet Gambling Funding Prohibition Act and The Internet Gambling Licensing And Regulation Commission Act: Hearing Before the Subcomm. on Crime, Terrorism, And Homeland Security of The H. Comm. on the Judiciary* (Apr. 29, 2003) (emphasis added). Also in 2003, the Department advised the National Association of Broadcasters (NAB) that media businesses were likely "aiding and abetting" violations of federal law when they circulated advertising on gambling sites. The letter noted that with very few exceptions, federal laws prohibit Internet gambling within the United States, and "notwithstanding their frequent claims of legitimacy, Internet gambling and offshore sportsbook operations that accept bets from customers in the United States violates [the Wire Act and other federal laws]." *DOJ Letter to NAB*, June 11, 2003, <http://www.igamingnews.com/articles/files/NAB_letter-030611.pdf>; *see also* Letter from Michael Chertoff, Assistant Att'y Gen., to Wayne Stenehjem (Mar. 7, 2005) ("As set forth in prior Congressional testimony, the Department of Justice believes that federal law prohibits gambling over the Internet, *including casino-style gambling*. While several federal statutes are applicable to Internet gambling, the main statutes are Sections 1084 [and others]") (emphasis added).

[54]Letter from Michael Chertoff, Assistant Att'y Gen., to Wayne Stenehjem (Mar. 7, 2005); *see also* Letter from Michael Chertoff, Assistant Att'y Gen., to Dennis Neilander, Chair of Nevada Gaming Control Board (Aug. 23, 2002), <http://www.hsgac.senate.gov/download/chertoff-letter>.

[55]*Establishing Consistent Enforcement Policies in the Context of Online Wagers: Hearing Before the H. Comm. on the Judiciary* (Nov. 14, 2007).

[56]Skidmore v. Swift & Co., 323 U.S. 134 (1944).

[57]*Id.* at 140 (emphasis added).

to find that federal law offered few weapons against this form of criminal activity.[58] The Kefauver Committee was formed in 1950 to study and investigate "whether organized crime utilizes the facilities of interstate commerce or otherwise operates in interstate commerce in furtherance of any transactions which are in violation of the law … and, if so, the manner and extent to which, and the identity of the persons, forms, or corporations by which such utilization is being made."[59]

The Kefauver Committee issued four reports and concluded that nationwide organized crime syndicates did exist and that they relied largely on revenue generated through gambling operations, including numbers games. For example, the Committee reported:

> The committee lately exposed another interstate gambling empire of impressive proportions, which has grown up in defiance of the old lottery law by decentralizing its operations and attenuating its interstate ties: The Treasury balance lottery racket. …
>
> The committee concentrated on the ramifications of a multi-million-dollar Treasury-balance lottery … [which,] according to testimony obtained by the committee, operates in most of the Eastern States and in sections of the Midwest. Tickets are sold for 25 cents and 50 cents, with occasional "specials" during the year selling for $1. The last five figures of the daily balance issued by the United States Treasury determine the winners. The ticket plays for 5 days, and top prize in most instances is $3,000. The odds against the betters are extremely heavy, and the profit of the racketeers who run the lottery is enormous.
>
> A special service of the Western Union Telegraph Co. speeds the number daily from Washington to 51 subscribers who have been identified either as the principals or chief agents in the operation of the racket throughout the East.[60]

In light of these and other findings related to the use of interstate telecommunications by organized crime for gambling purposes, the Kefauver Committee recommended that Congress pass a law prohibiting use of the wires to facilitate gambling.[61] Notably, the report did not restrict this recommendation to sports-related wagers.[62] Indeed, as discussed below, Senator Estes Kefauver (D-TN) expressed consternation during a 1961 Senate Judiciary Committee hearing over the fact that the initial draft of § 1084(a) of the Wire Act *was* expressly limited to sports-related wagers. Senator Kefauver's concerns prompted a re-write of the provision and resulted in the broader language ultimately enacted into law.[63]

3. Though the introduced version of § 1084(a) would have applied only to sports betting, pre-enactment changes increased its scope to cover all gambling

"Where the meaning of legislation is doubtful or obscure, resort may be had in its interpretation to … comparison of successive drafts or amendments to the measure."[64] In reviewing an ambiguous statute's legislative history, courts should presume that legislatures generally adopt amendments because they intend to change the original bill. Indeed, "adoption of an amendment *is* evidence that the legislature intends to change the provision of the original bill."[65]

As originally introduced, § 1084(a) would have imposed criminal penalties on anyone who "leases, furnishes, or maintains any wire communication facility with intent that it be used for the transmission in interstate or foreign commerce of bets or wagers, or information assisting in the placing of bets or

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[58]National Archives and Records Administration, *Records of Senate Select and Special Committees, 1789–1988*, *in* Guide to Federal Records in the National Archives of the United States: Bicentennial Edition (1989), <http://www.archives.gov/legislative/guide/senate/chapter-18-1946-1968.html#18E-2>.

[59]*See* Kefauver Report, *supra* note 49.

[60]*See* Kefauver Report, *supra* note 49, at E (1951); *see also* Kefauver Report, *supra* note 49, at VII(C)(c) (detailing the complex lottery scheme requiring the use of the wires, of which famed mobster Louis Cohen was believed to be the ruler).

[61]*See id.*

[62]*Id.* ("[T]ransmission of gambling information across State lines by telegraph, telephone, radio, television, or other means of communication or communication facility should be regulated to as to outlaw any service devoted to a substantial extent on providing information used in illegal gambling.").

[63]*See infra* notes 44–46, and accompanying text.

[64]Wright v. Vinton Branch of the Mountain Tr. Bank of Roanoke, 300 U.S. 440, 464 n.8 (Brandeis, J.); *see also* United States v. Pfitsch, 256 U.S. 547 (1921); United States v. Great Northern Ry. Co., 287 U.S. 144 (1932); 2A Sutherland Statutory Construction § 48:18 (7th ed.).

[65]Miller v. Callahan, 964 F. Supp. 939, 949 (D. Md. 1997) (emphasis added) (citation omitted).

wagers, on any sporting event or contest . . . ."[66] In other words, the provision would have imposed penalties on providers of wire communication services (rather than users), and was *clearly* limited to sports-related wagers.

The Senate Judiciary Committee, after conducting hearings on the topic, changed the bill in three ways. First, it changed the class of covered persons from those who *provide* wire communication facilities with the intent that they be used for illicit gambling to those who *use* wire communication facilities for illicit gambling purposes. Second, it added a clause prohibiting transmissions relating to "money or credit" as a result of bets or wagers. Third, it added the second clause prohibiting "the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers." By adding the second clause, the Committee reversed the previous draft's *clear* limitation to only sports-related wagers and expanded the universe of prohibited conduct to other forms of gambling.

An exchange between Senator Kefauver (who was arguably the Senate's foremost expert on organized crime) and then-Assistant Attorney General Herbert Miller at a hearing on the draft legislation reveals how these three changes came about.[67] Senator Kefauver expressed the following to Mr. Miller: concern that communication companies could be unduly vulnerable to criminal liability;[68] his opinion that the legislation should be expanded to include transmissions of money or credit;[69] and concern that the bill, as introduced, was limited to sports betting and did not include other, non-sports wagers.[70] Ultimately, the Committee amended the original version of § 1084(a) to address the issues raised by Senator Kefauver during the hearing on the legislation.

The OLC Opinion points to this exchange—specifically, a point where Mr. Miller states that the legislation is limited to sports gambling—to support its claim that the Wire Act proscribes only sports gambling. However, in so doing, the Opinion omits a relevant portion of the exchange and fails to mention that the provision which Mr. Miller contended limited the bill to sports betting never became law, but rather was struck by the Committee after the hearing and replaced with the broader language subsequently enacted into law.

The OLC Opinion also fails to recognize that the Judiciary Committee did not simply *revise* § 1084(a), it *struck and re-wrote* that provision's core.[71] In analyzing the enacted version of § 1084(a), the OLC Opinion states that the commas around the phrase "or information assisting in the placing of bets or wagers" were deleted.[72] The OLC then claims that because the legislative history does not specify that removing those commas was intended to broaden the bill's scope to include non-sports betting, that could not have been the Committee's intent.[73]

But, the Committee did not specifically delete commas. Instead, following Senator Kefauver's exchange with Mr. Miller, the Committee completely rewrote the subsection, striking all of § 1084(a), other than provisions related to sanctions, and replacing it with the version found in current law. The reproduction of the Act as reported by the Committee shows the following progression:

Text of § 1084(a) as introduced:

> Whoever leases, furnishes, or maintains any wire communication facility with intent that it be used for the transmission in interstate or foreign commerce of bets or wagers, or information assisting in the placing of bets or wagers, on any sporting event or contest, or knowingly uses such facility for any such transmission, shall be fined not more than $10,000 or imprisoned not more than two years, or both.[74]

Language struck following Senate Judiciary Committee hearing:

> ~~Whoever leases, furnishes, or maintains any wire communication facility with intent that~~

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[66]S. 1656, 87th Cong. § 2 (1961).
[67]*The Attorney General's Program to Curb Organized Crime and Racketeering: Hearings before the S. Comm. on the Judiciary*, 87th Cong. 284, 275–79 (1961).
[68]*Id.* at 276–77.
[69]*Id.* at 278 ("Why should not S. 1656 be expanded to include transmission of money? Money is frequently sent by Western Union is it not?").
[70]*Id.* at 277, 278 ("Why do you not apply the bill to any kind of gambling activities, numbers rackets, and so forth? . . . In 1951 we had quite an investigation . . . where a lot of telephones were used across State lines in connection with policy and the numbers games up there . . . . I can see that telephones would be used in sporting contests, and it is used quite substantially in the numbers games, too.").
[71]*See supra* note 50 and accompanying text.
[72]OLC Opinion, *supra* note 2, at 6–7.
[73]*Id.*
[74]S. 1656, 87th Cong. § 2 (1961).

~~it be used for the transmission in interstate or foreign commerce of bets or wagers, or information assisting in the placing of bets or wagers, on any sporting event or contest, or knowingly uses such facility for any such transmission,~~ shall be fined not more than $10,000 or imprisoned not more than two years, or both.[75]

Language added following Senate Judiciary Committee hearing (enacted version):

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.[76]

The OLC Opinion states: "[N]othing in the legislative history of this amendment suggests that … Congress intended to expand dramatically the scope of prohibited [conduct]."[77] This statement is false. Senator Kefauver stated during the hearing his concern the bill as introduced was limited to sports gambling, and the Committee addressed his concern (along with the two other concerns he raised). Courts frequently look to such indicia for clues as to how to interpret a statute.[78] The OLC failed to do the same.

4. The Wire Act was one component of a multi-statute program developed to crack down on gambling activities by organized crime writ large, not just sports-related gambling

Robert F. Kennedy, who served as attorney general of the United States when the Wire Act was enacted, made defeating organized crime a top priority of his Department.[79] "[F]or Kennedy, the Wire Act wasn't really about betting on horses or football. It was instead intended to strike at organized crime. To fight the enemy within, America would have to federalize criminal statutes previously enforced by states."[80]

After Kennedy was sworn in as attorney general, the DOJ developed a package of laws targeting organized crime. Kennedy's efforts, which were directly informed by the work of the Kefauver Committee,[81] resulted in the enactment of the Wire Act (targeting transmission of betting information across state lines), the Travel Act[82] (targeting those who travel across state lines to advance illegal enterprises, including gambling enterprises), and the Gaming Paraphernalia Act[83] (targeting those who ship gambling devices across state lines). Congress considered these bills contemporaneously with one another, and President John F. Kennedy signed them into law at a single ceremony on September 13, 1961.

The Travel Act and Gaming Paraphernalia Act both cover non-sports wagers because it was well-known (thanks in part to the Senate hearings of the 1950s) that organized crime engaged in the movement across state lines of individuals and equipment involved in non-sports gambling (such as lotteries).[84] Viewed in this context, including the fact it was also well-known that organized crime was engaged in moving communications across state lines to facilitate non-sports gambling, it would make no sense to conclude that the Wire Act, which was viewed as an integral piece of this trio of anti-organized crime legislation, did *not* cover numbers games and other non-sports wagers.

There was no reason for Kennedy's Justice Department to advocate for a *narrower* universe of

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[75]*See* S. REP. No. 87-588, 87th Cong., 1st Sess. (July 24, 1961).
[76]*See id.*; *see also* Pub. L. No. 87-216, 75 Stat. 491 (1961).
[77]OLC Opinion, *supra* note 2, at 6.
[78]*See, e.g.*, Bindczyck v. Finucane, 342 U.S. 76, 83 (1951); FTC v. Raladam Co., 283 U.S. 643, 648 (1931); United States ex rel. Bayarsky v. Brooks, 154 F.2d 344, 346–47 (3d Cir. 1946); First Allmerica Fin. Life Ins. Co. v. Sumner, 212 F. Supp. 2d 1235, 1240–41 (D. Or. 2002).
[79]David Schwartz, *Not Undertaking the Almost-Impossible Task: The 1961 Wire Act's Development, Initial Applications, and Ultimate Purpose*, 14 GAMING L. REV. AND ECON. 533 (2010).
[80]*Id.*
[81]Ryan P. McCarthy, *Information Markets As Games of Chance*, 155 U. PA. L. REV. 749, 761–762 (2007).
[82]18 U.S.C. § 1952(b)(1).
[83]18 U.S.C. § 1953(a).
[84]*See* 18 U.S.C. § 1952(b)(1) (covering any "gambling" activity); 18 U.S.C. § 1953(a) (covering bookmaking, wagering pools with respect to a sporting event, and "a numbers, policy, bolita, or similar game . . . .").

prohibited conduct under the Wire Act (sports gambling) given the broader scope of the Travel Act and the Gaming Paraphernalia Act (which encompassed numbers and casino-style gambling in which organized crime was extensively involved). Kennedy was undoubtedly well versed in the Kefauver and McClellan Committees' conclusions and recommendations, including those pertaining to organized crime activity in numbers games and rackets.[85] Indeed, Kennedy was focused on "bookmaking (dominated by horserace betting and wire transmissions of the same) as well as numbers games . . . ."[86]

Just days before the Senate sent the Wire Act to President Kennedy for his signature, the Senate Permanent Subcommittee on Investigations held hearings on organized crime that informed senators again of the widespread use of the wires to engage in a wide range of illicit gambling activities, including lotteries and numbers games.[87] The Subcommittee received testimony from Judge Goodman A. Sarachan, a member of the New York State Crime Commission, who relayed how the numbers racket was a "serious type of gambling" throughout New York that relied upon use of the wires.[88] He added that the numbers games were overseen by organized crime syndicates and were played in a variety of ways, noting, for example, how horserace results often served as the source for a popular numbers game.[89]

When crafting the Wire Act, Congress was aware that different forms of gambling were favored by different demographics. For instance, according to witness testimony, bets on horseracing and sporting events were favored by more affluent citizens—those who could afford the $2 wagers.[90] Lottery-type gambling, on the other hand, was more common in poorer neighborhoods.[91] There is simply no indication that Congress or DOJ intended to create a distinction in the Wire Act under which organized crime would be criminally barred from taking bets from more affluent citizens, but would be free to prey on people who could not afford to wager on horses. Indeed, such an outcome would contradict Attorney General Kennedy's statements regarding the wide array of victims and types of organized gambling activities.[92]

C. Flawed legal analysis in the OLC Opinion does not justify reversing the Department's 50-year interpretation of the Wire Act

The reasoning of the OLC Opinion is flawed in other respects. The Opinion cites *In re MasterCard* in support of the proposition that § 1084(a) does not apply to non-sports gambling.[93] The district court in *MasterCard*, however, cited case law addressing the first clause of § 1084(a), not the clause prohibiting "the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers"—the clause which does not include the qualifier "on any sporting event or contest."[94] Further, the *MasterCard* trial court relied on unenacted legislation (which would have amended § 1084 to clarify

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[85]Ryan P. McCarthy, *Information Markets As Games of Chance*, 155 U. PA. L. REV. 749, 761–762 (2007).

[86]Schwartz, *supra* note 79, at 534.

[87]*See Gambling and Organized Crime: Hearings before the S. Permanent Subcomm. on Investigations of the S. Comm. on Gov't Operations*, 87th Cong. (1961).

[88]*Id.*

[89]*Id.* ("They take the numbers of the horses that win and combine them together … for example, if No. 2 horse wins the first race, No. 5 the second, and No. 7 the third, you either bet that your number will be 257, or you bet that your number will be any combination of that, like 527, and so on."). This scheme is very similar to the Treasury balance lottery ticket scheme that the Kefauver Committee discovered the previous decade.

[90]*Id.* (statement by Mr. Sarachan).

> We have gone into a great deal of study of every type of professional gambling. On the numbers or policy racket, as it is sometimes called, we devote a considerable part of our report to it. The numbers racket is the type of gambling that is indulged in by people to whom $2 is too much to bet at one time. The minimum you can bet with a bookie is $2 on a horse race. So there is this widespread activity, and it runs into millions of dollars, but it starts with pennies, particularly in poor sections of the larger cities. For example, in the city of Buffalo, we had witnesses, one witness after another get up and say that there isn't anybody in that particular neighborhood, which is the poorest in the city, that doesn't buy a numbers ticket every single day, for 10 cents, 25 cents; 50 cents is a big ticket.

[91]*Id.*

[92]Robert F. Kennedy, *The Baleful Influence of Gambling*, ATLANTIC (1962) ("[O]nce the housewife, the factory worker, or the business executive gives money to a local bookie or policy writer, it disappears into the pocket of the underworld figure, who is in business to cheat the government—and his customer, if he can: And while many persons may regard the bookie on the other end of the telephone and the neighborhood numbers writer as the gambling racketeers, actually they are usually the small-time front men who stand to make a profit with every person who bets with them.").

[93]OLC Opinion, *supra* note 2, at 3 (citing *In re MasterCard Int'l Inc.*, 132 F. Supp. 2d 468 (E.D. La. 2002)), *aff'd*, 313 F.3d 257 (5th Cir. 2002)).

[94]*In re MasterCard Int'l Inc.*, 132 F. Supp. 2d at 480.

beyond doubt that it includes non-sports-related gambling), reasoning that the proposal of such legislation constitutes evidence the Wire Act applies exclusively to sports gambling.[95] Meanwhile, since the court's decision, other unenacted legislation has been introduced to explicitly exempt poker and other "games of skill" from the Wire Act's reach.[96]

The *MasterCard* court further relied on a single floor statement by then-House Judiciary Committee Chairman Emanuel Cellar (D-NY) that, "this particular bill involves … bets and layoffs on … sporting events."[97] Floor statements generally are given less weight than other types of legislative history.[98] By contrast, official committee reports are much more authoritative evidence of legislative intent. "A committee report, representing a collective statement by the drafters about the intended purpose of proposed legislation, is considered a particularly good indicator of congressional intent when it is otherwise difficult to ascertain."[99] As discussed above, language in the Committee Reports of the House and Senate Judiciary Committees contradict the *MasterCard* court's narrow interpretation.

The OLC Opinion made no mention of these problems with the *MasterCard* court's approach. It did not address the plausible conclusion that the unenacted legislation cited in *MasterCard* did not pass because Congress saw no need—believing that contemporaneous statements by the Department as to the Wire Act's coverage of non-sports bets and the Department's consistent, longstanding interpretation of the Act made such legislation unnecessary.[100]

At the same time, the OLC Opinion failed to analyze *United States v. Lombardo*, which addressed the disjunctive structure of § 1084(a) and held that exclusion of the "sporting event or contest" phrase from all but the first clause of § 1084(a) indicated that at least part of the Wire Act applied to non-sports-related gambling transmissions.[101] The *Lombardo* court also examined the Tenth Circuit Criminal Pattern Jury Instructions, which do not include a "sporting event" qualifier in the elements of offenses under § 1084(a) involving the transmission of information assisting in the placing of bets or wagers or the transmission of information regarding entitlement to money or credit resulting from bets or wagers.[102] The OLC Opinion gives short shrift to the reasoning of the *Lombardo* court and cites the case only once in support of the proposition that "sparse case law on [the] issue is divided."[103]

Further, while the OLC Opinion notes that the District Court for the Eastern District of Missouri in *United States v. Kaplan*[104] took a similar approach to that of the *Lombardo* court,[105] the Opinion's one-sided analysis overlooks numerous other instances in which the DOJ used § 1084 to prosecute gambling transmissions unrelated to sports.[106]

III. CONCLUSION

To properly interpret the Wire Act it is essential to study its text, examine how and why it was enacted into law, and utilize traditional canons of statutory construction. It is not clear whether, or to what extent, the OLC engaged in such an analysis. The Opinion fails on these fronts.

The Wire Act was enacted as a part of a package of anti-crime legislation developed by Congress over the course of a decade following hours upon hours of testimony on the operations of organized crime and its reliance on revenues derived from

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[95] *Id.* at 480–81.

[96] *Id.*; *see* Skill Game Protection Act, H.R. 2610, 110th Cong. § 3 (2007).

[97] *In re MasterCard Int'l Inc.*, 132 F. Supp. 2d at 480–81 (citing 107 CONG. REC. 16533 (Aug. 21, 1961)).

[98] Kenna v. U.S. Dist. Court for C.D. Cal., 435 F.3d 1011, 1015 (9th Cir. 2006) ("Floor statements are not given the same weight as some other types of legislative history, such as committee reports, because they generally represent only the view of the speaker and not necessarily that of the entire body.").

[99] Pierpoint v. Barnes, 94 F.3d 813, 817 (2d Cir. 1996).

[100] For example, in 2003, John G. Malcolm, deputy assistant attorney general, testified before Congress that "The Department of Justice has long held, and continues to hold, the position that 18 U.S.C. § 1084 applies to *all types of gambling, including casino-style gambling, not just sports betting*." *Unlawful Internet Gambling Funding Prohibition Act and The Internet Gambling Licensing and Regulation Commission Act: Hearing Before the Subcomm. on Crime, Terrorism, And Homeland Security of the H. Comm. on the Judiciary* (Apr. 29, 2003) (emphasis added).

[101] United States v. Lombardo, 639 F. Supp. 2d 1271, 1281 (D. Utah. 2007).

[102] *Id.*

[103] OLC Opinion, *supra* note 2, at 3.

[104] United States v. Kaplan, No. 06-CR-337 CEJ (E.D. Mo. Mar. 20, 2007).

[105] OLC Opinion, *supra* note 2, at 3.

[106] *See, e.g.*, United States v. Vinaithong, 1999 U.S. App. LEXIS 6527 (10th Cir. Apr. 9, 1999) (prosecuting individuals for operating a "mirror lottery" based on Illinois state lottery); United States v. Manetti, 323 F. Supp. 683, 687 (D. Del. 1971) (involving operation of an illegal lottery); United States v. Chase, 372 F.2d 453, 457 (4th Cir. 1967).

illegal gaming operations, including sports and non-sports wagering.

The Wire Act was championed by an attorney general who, as chief counsel to one of the Senate Committees charged with investigating organized crime, sat through hours of hearings and promoted the Act and accompanying legislation as necessary to deprive criminal syndicates of needed revenues.

The Wire Act, as enacted, reflects changes made by the Senate Judiciary Committee to *broaden* the law's scope. The modifications were made after Senator Kefauver raised concerns that the legislation, as introduced, applied to sports-related bets only, despite evidence of use by organized crime of the wires for non-sports bets, too.

While the Wire Act was the product of a different time and era, its fundamental purpose remains the same: to serve as a tool for federal prosecutors to combat gambling activities operating or otherwise advanced through activities occurring across state lines. This purpose is hindered, not advanced, by the OLC Opinion.

In sum, a thorough review of the Wire Act, its construction, its purpose, and its history, demonstrate the deficiencies of the OLC Opinion. As such, OLC should voluntarily recall and revise the Opinion and advise states not to take actions in reliance on the Opinion until the questions related to the interpretation of the breadth of the Wire Act are settled.